

REMARKS***Claim Rejections - 35 U.S.C. §103***

Claims 1-7, 19-23, 25, 28 and 36 were rejected under 35 U.S.C. §103 as allegedly being unpatentable over United States Patent No. 5,558,084 to Daniell et al. in view of United States Patent No. 4,332,165 to Kawai. Reconsideration and withdrawal of the rejection is requested.

Applicant respectfully contends that there is no reason to combine Kawai et al. with Daniell et al. absent hindsight. Kawai et al. is in a completely different technical field to Daniell et al. Kawai et al. relates to engines and also mentions the field of industrial instrumentation, but there is no mention of medical applications. Accordingly, Applicant believes the combination of these two documents can only be made with the use of hindsight after reading Applicant's disclosure of its invention. In addition, Applicant submits that Kawai et al. is not reasonably pertinent to the problem solved by the presently claimed invention. The presently claimed invention solves the problem of how to control a heating plate or humidifier in a breathing assistance apparatus without the need for temperature sensors. Kawai et al. relates to measuring flow rate of intake air in an internal combustion engine. This bears no relation to the problem of controlling a humidifier in a breathing assistance apparatus and one of ordinary skill in the art would not look to Kawai et al. to solve the problem. There is nothing in the cited prior art to suggest that a measure of flow rate might be useful for controlling a humidifier in a breathing assistance apparatus.

Even if Kawai et al. were combined with Daniell et al., Applicant submits that the combination would not result in the invention defined in claim 1, 19 or 36. Each of claims 1, 19 and 36 require using a parameter indicative of the flow rate of gas through the conduit to control the power supply to the humidifier. The combination of Kawai et al. and Daniell et

al. might result in a breathing assistance apparatus with a means for measuring flow rate based on power delivered to a heater, but there is no disclosure, teaching or suggestion in either Kawai et al. or Daniell et al. of using a measure of flow rate to control the power supplied to a humidifier. The combination of Kawai et al. and Daniell et al. would provide: no hint of how a measure of flow rate of gas in the conduit might be useful.

Therefore, reconsideration and allowance of claims 1-7, 19-23, 25, 28 and 36 is requested.

Claim 29 was rejected under 35 U.S.C. §103 as allegedly being unpatentable over Daniell et al. in view of Kawai, and further in view of United States Patent No. 5,349,946 to McComb or United States Patent No. 5,031,612 to Clementi. Claim 29 is dependent upon claim 19 which Applicant submits is in condition for allowance. Reconsideration and allowance of claim 29 is requested.

Claim Rejections - 35 U.S.C. §103 - Disqualification of Reference

Claims 1-7, 19-23, 25, 28 and 36 were rejected under 35 U.S.C. §103 as allegedly being unpatentable over United States Patent No. 6,349,722 to Gradon in view of United States Patent No. 4,332,165 to Kawai. Claim 29 was rejected under 35 U.S.C. §103 as allegedly being unpatentable over Gradon in view of Kawai, and further in view of United States Patent No. 5,349,946 to McComb or United States Patent No. 5,031,612 to Clementi.

United States Patent Application Serial No. 10/001,596 and United States Patent No. 6,349,722 were, at the time the invention of United States Patent Application Serial No. 10/001,596 was made, owned by Fisher & Paykel Healthcare Limited.

Therefore, Applicant submits that United States Patent No. 6,349,722 to Gradon is disqualified as a reference under 35 U.S.C. §102(e)/103. Reconsideration and withdrawal of the rejections is requested.

In view of the above, Applicant respectfully submits that the claims of the application are allowable over the rejections of the Examiner. Should the Examiner have any questions regarding this Amendment, the Examiner is invited to contact one of the undersigned attorneys at (312) 704-1890.

Respectfully submitted,

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